LIBRARY
SUPREME COURT, U. S.
SUPREME COURT, U.S.
AUG 10 1970
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court No. 521

JOHN O'MALLEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH W. LOUISELL
Attorney for Petitioner
2066 Penobscot Building
Detroit, Michigan 48226
WO 2-8210

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court No. .....

JOHN O'MALLEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, by his attorney, Joseph W. Louisell, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. That the Petitioner prays that this Court construe this Petition as a joint petition with the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the case of *Anthony Cimini, Petitioner, v.*

United States of America, Respondent, United States Court of Appeals No. 20,002.

2. That your Petitioner hereby adopts by reference all of the questions presented and argument contained in the aforementioned Petition for Writ of Certiorari in the Cimini appeal.

3. That the printing of the Cimini Petition was completed before it was determined that a Joint Petition would be filed.

4. That both the Cimini Petition and the instant Petition arise out of the same cases in the United States Court of Appeals for the Sixth Circuit and the United States District Court, Eastern District of Michigan, Southern Division.

For the reasons aforementioned Petitioner does pray that the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit be granted and should adopt by reference the Petition filed in the Cimini appeal.

Respectfully submitted,

JOSEPH W. LOUISELL
Attorney for Petitioner
2066 Penobscot Building
Detroit, Michigan 48226

LIBRARY
SUPREME COURT, U. S.

Nos. 520 and 521

Supreme Court, U.S.
FILED
OCT 9 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

ANTHONY JOSEPH CIMINI, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

ROGER A. PAULEY,
Attorney,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:

Frazier v. *Cupp*, 394 U.S. 731	7
Marshall v. *United States*, 360 U.S. 310	6
United States v. *Desist*, 384 F.2d 889, affirmed on other grounds, 394 U.S. 244	8, 9
United States v. *Solomon*, 422 F.2d 1110, certiorari denied *sub nom. Sommer* v. *United States*, 399 U.S. 911	6

Statutes:

18 U.S.C. 659	2
18 U.S.C. 371	2

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 520

ANTHONY JOSEPH CIMINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 521

JOHN O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 520 App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1970. A petition for rehearing was denied on July 13, 1970. On August 10, 1970, the petitions for writs of certiorari were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether during the course of the trial the court properly denied petitioners' motions for mistrial on the ground that some jurors had been exposed to newspaper publicity, where on individual interrogation each juror had indicated that such exposure would not affect his ability to render an impartial verdict.

2. Whether the trial judge properly declined, during the jury's deliberations, to hold a hearing on petitioners' motions for a mistrial based upon allegations that the jury had been exposed to a prejudicial newspaper article appearing the previous night.

3. Whether the trial judge *sua sponte* should have held a hearing to determine whether the prosecution had provided information contained in the latter newspaper article.

STATEMENT

After a jury trial, petitioners were convicted in the United States District Court for the Eastern District of Michigan of conspiracy to steal from interstate commerce (18 U.S.C. 371) and of possession of property stolen from an interstate shipment (18 U.S.C. 659). Petitioner Cimini was sentenced to concurrent

terms of four years' imprisonment; petitioner O'Malley was sentenced to concurrent five-year prison terms. The court of appeals affirmed (Pet. No. 520 App. A).

1. During the week-end recess following the first week of trial[1] an article relating to defense attorney Carl Ziemba appeared in one of the Detroit daily newspapers. After motions for a mistrial were made, all the members of the jury assigned to try the case were individually questioned by the trial court. Each denied reading the article. One female juror stated that her husband had read a portion of it to her. The questioning further revealed that there was some discussion of the article among certain of the jurors and nine members of the jury were aware of this discussion. The conversation was apparently very brief and was limited to the fact that one of the defense attorneys had been a prosecutor. There was a favorable comment on the intelligence of one defense attorney, presumably Mr. Ziemba. Every juror affirmatively stated that the discussion had not impaired his ability to render a fair and impartial verdict (Tr. 514-537). Based on this showing, the district judge denied the motions for a mistrial.

2. The jury began its deliberations on a Wednesday afternoon (T. 1118). At 3:40 p.m., the jury requested supplemental instructions as to the counts with which each defendant was charged. At this point the jurors

---

[1] The trial lasted three weeks and is reported in 1218 pages of transcript, herein designated "Tr." No issue is raised concerning the sufficiency of the evidence.

had apparently elected a foreman (T. 1121). The supplemental instructions were given and the jury was excused for the day at approximately 5:00 p.m. The trial judge admonished them not to read the newspapers or listen to anything on radio or television about the case and to resume their deliberations at 9:00 a.m. the following morning (Pet. No. 520 App. D, 7). At 8:00 p.m. that night, a short article was published on page 14-A of a Detroit daily paper under the caption "Jury Out In TV Hijack Case."[2] The article cited the fact that the instant case was Mr. Ziemba's first since leaving the prosecutor's office to "join the law firm noted for its defense of Mafia figures." It also referred to Anthony Cimini as having been named a "Mafia" member by a former Detroit Police Commissioner in a 1963 hearing before a Senate Subcommittee and said that he had previously been convicted of interstate shipment of stolen securities in a case which was then pending on appeal. (see Pet. No. 520, p. 5, App. D, 8-9). At 9:02 a.m. the following morning, the judge received a note from the jury requesting the names of the defendants and their attorneys (Pet. No. 520 App. D, 7). The court considered the request in chambers with counsel and determined not to grant it. During that time, the court received a further note indicating that the jury had reached a verdict (Pet. No. 520 App. D, 6-7).

At this point the district court asked for suggestions from defense counsel. Mr. Ziemba inquired

---

[2] We are lodging a copy of this newspaper with the Clerk of this Court.

whether it was implicit in the Court's instructions to the jury the evening before that they should not resume deliberations in the absence of all twelve jurors. The court responded affirmatively. Mr. Ziemba then stated that he had seen juror No. 12 first arriving in the building at 9:25 a.m. that morning. He argued that this indicated that the other eleven jurors had disobeyed the court's instructions not to resume deliberations in light of the note sent by the jury at 9:02 a.m. After calling the court's attention to the newspaper article which had appeared the previous evening, Mr. Ziemba argued that the only fair inference which could be drawn from the jury's note requesting the correct spelling of the defendants' and their attorneys' names was that members of the jury were giving improper consideration to the newspaper article. He moved that a mistrial be declared. Attorneys for other defendants joined in the motion and moved that the jurors be examined as to whether they had read the newspaper article. After a colloquy, the trial court denied the motion to examine the jurors and to declare a mistrial pointing out that it had continuously admonished the jury not to read the papers or listen to television or the radio (Pet. No. 520 App. D, 7-14).

ARGUMENT

1. Petitioners contend that the trial judge erred in refusing to grant a mistrial after several of the jurors indicated in an individualized *voir dire* examination during the trial that they had discussed an allegedly prejudicial newspaper article. During that

voir dire, however, each juror stated that the discussion did not relate to the case and would not affect his ability to render an impartial verdict. The court below found that "[a]t worst the publicity was no more than mildly adverse" (Pet. No. 520 App. A, 2). However characterized, it was not so inherently prejudicial as to cast doubt upon the jurors' assurances; accordingly the denial of the motion for a mistrial was not an abuse of discretion. See *Marshall* v. *United States*, 360 U.S. 310, 312; cf. *United States* v. *Solomon*, 422 F.2d 1110, 1117-1119 (C.A. 7), certiorari denied *sub nom. Sommer* v. *United States*, 399 U.S. 911.

2. Petitioners contend that the denial of their motions for mistrial or to examine the jurors based upon the article which appeared during the jury's deliberations was erroneous. There was, however, no showing that any juror had read or been exposed to this article. In view of the court's specific admonition to the jurors the previous night to avoid such exposure—an admonition made repeatedly during the trial—and the prior incident in which they had all been questioned following their discussion of a prior newspaper article, it is fair to conclude that the jurors had been impressed with the importance of performing their function without consideration of out of court publicity. Petitioners attempt to undermine this conclusion by contending that the jury's note sent at 9:02 a.m. the following morning (at a time when one of the jurors had not yet arrived), showed that the jury was interested in checking on whether the persons mentioned in the article were the same as those involved in the

trial. The jury, however, had been told not to resume deliberations until all twelve jurors were present. It is thus more reasonable to infer that this instruction was followed and that the note sent at 9:02, before the arrival of the twelfth juror, had been prepared the previous afternoon pursuant to an agreement that it be communicated to the court the next morning. Five defendants were on trial, each represented by a different attorney. The jury had previously requested instructions as to which defendant was charged with which counts, and the logical assumption is that the morning request sought further clarification along the same lines. The contention that the jury must have read the newspaper article was nothing more than tenuous speculation and, under all the circumstances, the trial judge was justified in believing that the jury had followed his repeated specific admonitions about press publicity. See *Frazier* v. *Cupp*, 394 U.S. 731, 735.[3]

3. During the colloquy on the second motion for a mistrial, one defense attorney suggested that the prosecutor may have caused the release of the newspaper article which was the subject of the motion. The attorney alleged that on the previous day in the courtroom hallway he had seen the prosecutor talking

[3] Petitioners' reliance upon decisions from other circuits as establishing a conflict on this issue is not well taken. The Seventh Circuit decisions cited (Pet. No. 520, 9-10) dealt with prejudicial publicity during trial and the requirement that the trial court interrogate the jurors as to whether they heard or discussed the publicity. The other circuit decisions cited are equally distinguishable on their facts (see Pet. No. 520, 10).

to the reporter who had written the article. According to the attorney, the reporter had a copy of the indictment as well as the names and addresses of the defendants; the reporter asked the prosecutor whether he had all the pertinent information in this matter; and the prosecutor responded affirmatively and told the reporter that he could turn in the story. The defense attorney argued that this demonstrated bad faith on the part of the government necessitating a mistrial (Pet. No. 520 App. D, 11-13).

Petitioners do not contend in this Court [4] that a mistrial should have been granted but argue (Pet. No. 520 10-12) that the trial judge *sua sponte* should have held a hearing to determine whether the prosecutor had caused the story, as it appeared in print, to be released. Cf. *United States* v. *Desist*, 384 F.2d 889, 904 (C.A. 2), affirmed on other grounds, 394 U.S. 244, in which the Second Circuit indicated the desirability of a hearing following the publication of an article during trial referring to one of the defendants as having been "identified by the Govenment as an underworld figure here." The court in *Desist* indicated that a hearing should be held in such circumstances "to find out who, if anyone, spoke for the 'Government,' so that proper measures could be considered, e.g., transmittal of the hearing transcript to the appropriate bar association or to the employee's supervisor." *Ibid.* In the present case there was, however, no indication that a member of the prosecution staff had referred to any defendant in prejudicial terms. The facts alleged

---

[4] The issue was concededly not raised in the court of appeals (Pet. No. 520 App. A).

by defense counsel showed only that the prosecutor had told the reporter that he had all the "pertinent information" about the case and "could turn in the story" (Pet. No. 520 App. D, 12-13), not that the prosecutor had read and authorized for release a draft of the article as it appeared.[5] In these circumstances, no hearing was required. Moreover, absent any showing that the jurors read the article, such conduct would not be cause for reversal of petitioners' convictions. See *Desist*, *supra*.

---

[5] At the time this charge was made government counsel noted that he did not wish "to take the Court's time to even get into that" (Pet. No. 520 App. D, 13). By this comment he obviously rejected any contention that the government had provided any prejudicial or unauthorized information. In view of the fact that this contention is again being asserted—although it was not raised in the court of appeals—we have made further inquiry into the matter and are satisfied that the only information released to the press was in the standard release made at the time of the indictment—*i.e.* the names, ages and addresses of the defendants, a copy of the indictment and information as to the maximum penalty that could be imposed.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
Attorney.

OCTOBER, 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1970 405975 233

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI, Petitioner

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

PHILIP A. GILLIS
ROSS B. MERETSKY, of Counsel
Attorneys for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI, Petitioner

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

The thrust of the government's argument seems to be that a defendant on trial is not entitled to a hearing unless in advance of hearing he is able to prove those facts which only a hearing can bring out.[1] This is reminiscent of Will

[1] "There was, however, no showing that any juror had read . . . this article." U. S. Brief in opposition, p. 6. "The contention that the jury must have read the newspaper article was nothing more than tenuous speculation." id, p. 7. "There was, however, no indication that a member of the prosecution staff had referred to any defendant in prejudicial terms." id, p. 8.

Rogers' description of a bank as a place where a fellow can borrow money if he can prove he doesn't need to.

The government brief, p. 7, footnote 3, attempts to explain away the conflict of circuits by asserting that the other circuits were dealing with prejudicial publicity "during trial." If there is a distinction between jury exposure to prejudicial publicity during trial and exposure to such during deliberations—the government articulates none—the latter more urgently requires a hearing to assure that the jury has been "immunized from outside influence." *U. S. v. D'Antonio* (CA-7, 1965) 342 F2d 667.

Finally, at page 9 of its brief the government goes outside the record to assert that the only information given to the press was in the "standard release made at the time of the indictment—, i.e., the names, ages and addresses of the defendants, a copy of the indictment and information as to the maximum penalty."[2] Aside from the fact that the

---

[2] We believe that the Solicitor General has been misinformed as to the nature of the "standard release" in the Detroit area. The special task force agents and attorneys who handled petitioners' prosecution were responsible for the indictment of petitioner Cimini two weeks ago on an unrelated matter. The acting U.S. Attorney and the Agent in charge were interviewed on television as follows:

> Commentator: "Acting U.S. Attorney Ralph Guy and FBI Special Agent in Charge Neil Welsh detailed events leading up to the arrests early this morning."
>
> RALPH GUY: ". . . ment (the station started the voice late here) which was returned earlier this week charging fifteen individuals, *seven of whom have been identified at various times as members of the Detroit area organized crime syndicate. The indictment also mentions one other person, not a defendant, who has been mentioned in testimony before the United States Senate. The eight* individuals so identified include Jack Tocco, Dominic Corrado, Matthew Rubino, Anthony Besase, Dominic 'Sparky' Corrada, Peter Vitale, and Anthony Cimini. The indictment specifies that

(continued on next page)

record here, even without a hearing, belies the assertion since at least some information was given to the press by the government *during trial* [D-12], the ex parte, off-the-

---

(continued from preceding page)

in 1960 a scheme was devised whereby three individuals set up a furniture store with the specific purpose in mind of securing merchandise, dissipating the assets, and then throwing the business into bankruptcy, thus fraudulently defrauding creditors. In 1962 three individuals were indicted on this charge, two of them were convicted, and the third was acquitted. The defendants that were arrested today are specifically charged with aiding and abetting in the dissipation of the assets and the merchandise, in connection with the bankruptcy fraud knowing that the whole operation was originally conceived to be put into bankruptcy."

COMMENTATOR: "Specifically who, that's named in the indictment is connected with the Hazel Park Raceway?"

NEIL WELSH: "Well, Jack Tocco, of course, is on the Board of Directors and is one of the executive officers at the Race Track. And there's one other individual as well."

(Transcript of broadcast of September 25, 1970 on WXYZ-TV at 6 p.m. as recorded by Radio TV Reports, Inc., 41 East 42nd Street, New York, N.Y. 10017. Emphasis is added.)

A page one story in the local paper of the same day read, in part:

"[Neil J.] Welsh [Michigan Head of the FBI] said eight of those named in the indictment have been identified at various times as 'members of the Detroit-area organized crime syndicate.'

"Tocco and Corrado were named by the Department of Justice in the Congressional Record on Aug. 12, 1969, as being among the 'top nine Mafia leaders in Detroit.'"

The article went on to give details of the evidence—details which were not in the indictment.

"Finally, as federal agents say the alleged schemers fully expected, the firm's creditors demanded an accounting. . . . That fall . . . store employees . . . stashed the goods, it is charged, in two hidden warehouses—first on Warren and later on Mack." (Ironically, upon defense demands for such information prior to moving for a bill of particulars, the government refused to furnish the defense with the information contained in the press release.)

record, months-after-the fact investigation by the Solicitor General hardly can be an adequate substitute for an adversary hearing in open court at the time of trial.

Respectfully submitted,

PHILIP A. GILLIS
ROSS B. MERETSKY
Of Counsel
Attorneys for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 27 1970
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI and
JOHN J. O'MALLEY,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP A. GILLIS
Attorney for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226
WO 2-1016

ROSS B. MERETSKY
Of Counsel
817 Penobscot Building
Detroit, Michigan 48226
964-6494

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226
WO 2-8210

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI and
JOHN J. O'MALLEY,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Anthony Joseph Cimini and John J. O'Malley, hereby petition the Supreme Court for rehearing of its order denying the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petitioners' reasons are as follows:

I.

AS A MATTER OF PUBLIC RELATIONS, THIS COURT SHOULD LET THE STATES KNOW THAT IT WILL PATROL THE FEDERAL COURTS TO PREVENT UNFAIRNESS WITH THE SAME VIGOR THAT IT DISPLAYS IN PREVENTING THE STATES FROM VIOLATING DUE PROCESS.

In the past half century, this Court has reviewed a substantial number of state convictions involving constitutional questions related to pretrial and trial publicity. For example see *Shepherd v. Florida* (1951), 341 U.S. 50 (concurring opinion); *Irvin v. Dowd* (1961); 366 U.S. 717; *Rideau v. Louisiana* (1963), 373 U.S. 723; *Sheppard v. Maxwell* (1966); 384 U.S. 333; *Moore v. Dempsey* (1923), 261 U.S. 87; *U. S. ex rel. Darcy v. Handy* (1956), 351 U.S. 454; *Estes v. Texas* (1965), 381 U.S. 532; *Beck v. Washington* (1962), 369 U.S. 541; and *Stroble v. California* (1952), 343 U.S. 181.[1]

Most of these cases generated extensive and multiple opinions in this Court. During the same period, by way of contrast, not a single authored opinion has come out of this Court relating to pretrial or trial publicity in a Federal case. Only once has the Court written on this subject at all and that was the brief *per curiam* opinion in *Marshall v. United States* (1959), 360 U.S. 310.

The failure of the court to consider such questions in the context of a Federal prosecution was not from a lack of opportunity. The issues have been unsuccessfully tendered to this court on many occasions. For example, see *Miller v. United States*, 392 U.S. 929, denying certiorari to *U. S.*

[1] Decision in each case did not always turn on the publicity issue nor was the prisoner always successful. The only point we make is that this Court was willing to review the questions.

v. Miller, 381 F. 2d 529, and the number of cases cited in the annotation at 3 L ed 2d 1250 wherein this court denied certiorari to review such questions in Federal prosecutions.

This Court has often said that the administration of justice must not only be fair but it must have the appearance of fairness. The Court should rightly concern itself with the appearances created by the exercise of its powers. If it appears that this Court is ignoring its own backyard while enforcing a cleanup program against the state courts, such will not promote the harmony which should exist among the partners in our dual judicial system.[2]

II.

THE DECISIONS OF THE COURT ON DIRECT AND HABEAS CORPUS REVIEW OF STATE CASES, TURNING AS THEY DO ON THE SOLE ISSUE OF DUE PROCESS, DO NOT OFFER SUFFICIENT GUIDELINES TO THE FEDERAL COURTS UNLESS THIS COURT IS PREPARED TO SAY THAT UNFAIRNESS IN FEDERAL PROSECUTIONS IS TOLERABLE IF NOT SO UNFAIR AS TO BE A DENIAL OF DUE PROCESS.

In *Sheppard v. Maxwell,* much of what the Court said would have been more appropriate to a case in which it was directly reviewing the judgment of a court over which it had supervisory power.[3] For example, what the Court

---

[2] Appearances can be deceiving. For example, this court summarily reversed a Federal conviction in *Janko v. United States,* 366 U.S. 716 because of prejudicial trial publicity, but it did so without opinion. The judicial politics of our dual system requires that this Court let the states know by formal opinion from time to time that it is imposing upon the Federal Courts the same limitations that it imposes upon the state courts in this area of trial publicity.

[3] "[We possess] no such corrective power over state courts as we do over the Federal courts." *Hoag v. New Jersey* (1958), 356 U.S. 464, 471.

suggested as procedure for the trial court to follow in handling publicity near or at the time of trial, 384 U.S. 358-362 was clearly dictum stated only by way of argument to support the ultimate conclusion that *Sheppard* was denied due process by the Ohio Court.

Contrast the extensive opinion in *Sheppard* with that in *Marshall*. While the court specifically recognized its duty "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the Federal Courts", 360 U.S. at 313, *its holding was confined to one brief paragraph* which opened:

> "The trial judge has a large discretion in ruling on the issue of prejudice . . . . Each case must turn on its special facts. 360 U.S. at 312."[4]

This language so watered down the decision that the Sixth Circuit was able to cite it rather than the actual holding which followed and thus sustained the conviction in *United States v. Rubino*, decided July 30, 1970.

Certainly the trial judge should have discretion in handling the publicity problem. But just as certainly he should be given more specific guidelines to aid him in the exercise of that discretion. The dictum of *Sheppard v. Maxwell* is not an adequate substitute for instructions from this Court in a case in which it is exercising its supervisory power.

If those members of this Court who voted to deny review of this case did so in the belief that the Court's decisions

---

[4] The court cited *Holt v. United States* (1910), 218 U.S. 245 a case which, far from being revitalized by current citation, should have been overruled. While the result in *Holt could have* been justified on the theory of waiver by the failure of the defendant to bring the offensive news articles to the attention of the judge before verdict, the actual rationale of decision is clearly inconsistent with the current views of the Supreme Court in applying the due process clause in State cases.

on review of state convictions are sufficient, they are, in effect, saying that a defendant in a federal criminal trial need be protected by the trial judge from adverse publicity only to the extent that due process requires it. This notion has long been rejected.[5]

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." *McNabb v. United States* (1943), 318 U.S. 332, 340.

In summation, review of the important questions we have presented will permit this Court, either in the exercise of its supervisory power or by implementation of the Fifth Amendment, to conform the practice of the Sixth Circuit to that of the other Circuits and to state in unmistakable language that all Federal courts are, at the very least, under the same obligations which this Court has imposed upon the state courts as a matter of due process under the Fourteenth Amendment.

---

[5] If the prosecution should deliberately leak information to the news media which is derogatory to the defendant, this alone might not be a denial of due process under all circumstances. But most assuredly the practice should never be countenanced in a federal prosecution. Declaration of mistrial, reversal of conviction, or other appropriate remedy for such reprehensible conduct should be fashioned by this Court.

[6] Since 2 members of this Court voted to grant certiorari, it hardly can be asserted that the questions do not at least verge on being important.

We respectfully ask that the court reconsider its denial of the petition for writ of certiorari and grant the same.

Respectfully submitted,

PHILIP A. GILLIS
Attorney for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226
WO. 2-1016

Of Counsel:

ROSS B. MERETSKY
817 Penobscot Building
Detroit, Michigan 48226
964-6494

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226
WO. 2-8210

November 25, 1970

CERTIFICATE OF COUNSEL

The undersigned hereby certifies to this court that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58, Paragraph 2 of the Rules of this court.

PHILIP A. GILLIS
Attorney for Petitioner

November 25, 1970